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Colorado General Assembly

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MEMORANDUM

TO: Martha Olson and Donald Anderson

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: November 17, 2017

SUBJECT: Proposed initiative measure 2017-2018 #79, concerning funding for public schools

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

1. The major purpose of the proposed amendment to the Colorado constitution appears to be to remove the provision in section 20 (8)(a) of article X of the Colorado constitution, commonly known as "TABOR", mandating that any income tax law change after July 1, 1992, shall require all taxable net income to be taxed at one rate.

2. To major purposes of the proposed amendments to the Colorado Revised Statutes appear to be:
- a. To create the quality public education account (account) as an account within the state education fund to receive all revenues collected through an income tax increment for public school funding and any other tax or source of funding dedicated to the account.
 - b. To require the general assembly to annually appropriate, and allow local school districts to spend money from the account for specified purposes.
 - c. To express the intention of the people that the general assembly enact a new public school finance law that substantially meets the requirements set forth in the proposed initiative.
 - d. To establish the purposes for which the money in the account must be appropriated and spent until such time as a new public school finance law has been enacted and has taken effect.
 - e. To use money appropriated from the account to supplement, not supplant, the level of general fund appropriations existing on the effective date of the initiative, plus annual inflation adjustments.
 - f. To require all money from the account to be appropriated and expended to support public schools, except as required by an individualized education program for an individual with a disability.
 - g. To require each school district receiving money from the account to make publicly available information concerning its mission and vision, current budget, audit, uniform improvement plan, and student achievement scores.
 - h. To require the Colorado department of education within five years of implementation of the account to commission a study on how money from the account was spent, as well as other reporting regarding the impact of the funding.
 - i. To require the general assembly to review a successor public school finance act within specific timeframes.
 - j. To authorize the state to retain and spend all revenues credited to the account.

- k. To increase income taxes imposed on individuals, estates, and trusts by creating an income tax increment for public school funding dedicated to the account at rates specified in the proposed initiative.
- l. To increase income taxes imposed on corporations by creating an income tax increment for public school funding dedicated to the account at a rate specified in the proposed initiative.
- m. To require that revenue generated from the tax increment for public school funding be credited to the account.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

- 1. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, the words "Adopted and" at the beginning of the proposed initiative should be removed.
- 2. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
- 3. Pursuant to article V, section 1 (4)(b) of the Colorado constitution, an initiated constitutional amendment must have the approval of at least fifty-five percent of votes cast. However, pursuant to article V, section 1 (4)(a) of the Colorado constitution, initiated measures that do not amend the constitution require approval of a majority of votes cast. The proposed initiative contains both amendments to the Colorado constitution and the Colorado Revised Statutes.
 - a. In light of the conflict between the provisions about the number of votes needed to pass, can an amendment to the Colorado constitution and the Colorado Revised Statutes be included in the same initiated measure?
 - b. Will the entire measure become effective based on exceeding a single threshold of votes?
 - c. What percentage of votes cast is necessary for the enactment of the proposed initiative?
 - d. What is the outcome if the proposed initiative receives the approval of fifty-two percent of the votes cast?

4. What will be the effective date of the proposed initiative?
5. The following questions relate to section 22-55-104.5 (1):
 - a. Does the statement of purpose in the proposed section 22-55-104.5 (1) have any legal effect?
 - b. Is the standard for the creation of a "sustainable, fair, and adequate system for financing public schools . . ." different from the standard for the "maintenance of a thorough and uniform system of public schools . . ." as required pursuant to section 2 of article IX of the Colorado?
6. What is the definition of "public schools" in section 22-55-104.5? Does this include institutions of higher education and career and technical education programs?
7. Section 22-55-102 creates definitions for purposes of the entire article 55 of title 22. That section defines "categorical programs", "inflation", "preschool programs", and "statewide base per pupil funding", as well as other terms that may be used in section 22-55-104.5. Do you intend for section 22-55-102 to define terms used in section 22-55-104.5?
8. The following questions relate to section 22-55-104.5 (2):
 - a. The new account is established within the state education fund created in section 17 (4) of article IX of the Colorado constitution. With respect to the proposed location of the account:
 - i. What is the purpose in creating the new account within the state education fund as opposed to a separate fund?
 - ii. Pursuant to section 17 (4)(b) of article IX of the Colorado constitution, money in the state education fund may only be used for specified purposes. Are the purposes for the use of the money in the new account the same as the purposes for use of the money in the state education fund?
 - iii. There are several references in the Colorado Revised Statutes to section 17 of article IX of the Colorado constitution. Those references may no longer be accurate if the state education fund includes a new account.
 - b. "Income tax increment" is not defined in the measure. What does it mean?

- c. If the general assembly enacted a law to increase all income tax rates by 1%, would that increase be required to be deposited in the account?
 - d. Does the requirement that the account "shall receive all revenues", which is an unusual phrasing, mean that the state treasurer shall deposit the revenues received from an income tax increment in the account?
 - e. Why have a generic reference to the taxes instead of cross-referencing the specific statutory provisions included in the measure? Do you intend for additional tax revenue from other measures at the 2018 general election to be deposited in the account?
 - f. Does the phrase "an income tax increment for public school funding approved by voters" require an entire income tax increment approved by voters to be deposited in the account? Could the general assembly reduce the amount of the income tax increment that is the required to be deposited in the account under section 6 of the proposed initiative?
 - g. The provision permits the people and the general assembly to dedicate "any other tax or source of funding" to the account.
 - i. Is a tax dedicated or is it the revenue from the tax?
 - ii. Does the term dedication imply a minimum time for which the revenue must be set aside for the account? Could a tax be dedicated for a single year or must it be on-going?
 - iii. What is "any other . . . source of funding"?
 - iv. Could the general assembly appropriate from the general fund or a cash fund to the account, or must it designate a tax or fee that is directly deposited in the account upon collection?
 - h. Money is required to remain in the account at the end of a fiscal year. Why only identify the general fund and the state education fund as the funds to which the money is prohibited from reverting? Can the money revert to "any other cash fund"? If not, then you might consider adding this phrase to the last sentence.
9. The following questions relate to section 22-55-104.5 (3)(a):
- a. Can the general assembly change the purposes specified in subsection (3) for which money is appropriated and spent, for example, repeal or add

purposes? Could the general assembly change the dollar amounts specified in subsection (3) for use of the money until such time as new public school finance law is enacted? As such, is the limitation that the money be appropriated as specified "until such time as a comprehensive new public school finance law . . . has been enacted" true or is it simply a statement of intent?

- b. Does money from the account need to support all of uses specified in subsection (3) at the same time?
 - c. What is the definition of "local school district"? Does "local school district" in section 22-55-104.5 have the same meaning as "school district" in section 2 of the proposed initiative?
 - d. Could the State Charter School Institute receive funding for institute charter schools, or a Board of Cooperative Services (BOCES) receive money for a BOCES school?
 - e. Section 22-55-104.5 states that a local school district "may annually expend" moneys from the account. Does a local school district have to expend money appropriated by the general assembly? Does it have to expend the money on the stated purposes or does it have discretion? What is the meaning of the term "may" in this provision?
 - f. Will the proposed tax increases generate enough money for all of the proposed programs specified in section 22-55-104.5 (3)(a) for fiscal year 2019-20? For future years?
 - g. What happens if there is not enough money for all of these purposes? Would the general assembly have to fund those purposes from the general fund or other cash funds?
 - h. In section 22-55-109 (3)(a)(IV), what does it mean to "increase annual state funding for pupils eligible for free lunch as necessary to include pupils eligible for reduced lunch"?
10. With respect to the intention of the people in section 22-55-104.5 (3)(b) that the general assembly enact a new public school finance law:
- a. What does it mean to provide a base per pupil funding level "moving toward" the national average? If the base per pupil funding increased by the requirement in section 17 (1) of article IX of the state constitution, would that be enough to satisfy this requirement?

- b. Is funding allocated in a "fair and equitable manner among the local school districts" so long as the new public school finance law recognizes differences related to size, geography, population demographics, and local economic and cost factors? Could the general assembly decide not to differentiate among school districts based on size or another of the factors? Could the new school finance law include other factors that create fair and equitable funding among school districts?
 - c. If the new school finance law does not include the temporary provisions and funding included in section 22-55-104.5 (3)(a), will the formula still "substantially meet" the criteria set forth in section 22-55-104.5 (3)(b)?
 - d. What does "more adequate funding" or "more adequately fund" mean in section 22-55-104.5 (3)(b)?
 - e. Who will decide if or when a new public school finance law that "substantially meets" the criteria set forth in section 22-55-104.5 (3) has been enacted and has taken effect? What if the general assembly never reaches agreement on a new public school finance law?
11. Under section 22-55-104.5 (4), the money appropriated from the account must supplement "the level of general fund appropriations existing on the effective date of this section, plus an additional annual adjustment for inflation up to a maximum annual adjustment of five percent."
- a. There is no limitation on the type of "general fund appropriations", and therefore, the plain language of this provision would mean any type of general fund appropriation. Is this your intention?
 - b. How will the level of general fund appropriations existing on the effective date of subsection (4) be determined? Is it money spent on the particular day? Is it the amount of general fund appropriations (for public schools or otherwise) for the fiscal year 2018-19, as of the effective date of the measure?
 - c. How does this requirement work with the similar, existing requirements in section 17 of article IX of the Colorado constitution in which the account is created?
 - d. Subsection (4) specifies that the maximum additional money from the account (as a percentage of existing general fund appropriations on the date of the election) plus inflation can be no more than 5 percent. Does this imply that the change in education appropriations from the account

(expressed as a percentage) can be no more than 5 percent less the rate of inflation? What happens if the rate of inflation is greater than 5 percent?

12. Section 22-55-104.5 (5) requires the money in the quality public education fund to be appropriated and expended "to support public schools". This is broader than the purposes specified in proposed subsection (3)(a) of the section. Is subsection (5) intended to expand the purposes specified in subsection (3)(a)?
13. The reporting requirement contained in section 22-55-104.5 (6)(a) requires each school district to make certain information publicly available "upon receiving money" from the account. Does this mean within the state fiscal year in which money is first received? Is the information required beyond the initial year in which the money is received?
14. With respect to section 22-55-104.5 (6)(b), what does "promoting continuous student achievement" mean for purposes of the study commissioned by the Colorado department of education. Is this determined by student achievement on Colorado's annual statewide achievement test or by something else? Is there more than one indicator of "continuous student achievement"?
15. Pursuant to section 22-55-104.5 (6)(c), the general assembly is required to periodically revise the school finance formula until the formula "enables all school districts to meet Colorado academic standards and performance frameworks"? What does it mean to "meet" Colorado academic standards and performance frameworks? What if this cannot be achieved for every school district or cannot be achieved within the resources available to the general assembly?
16. Is the change in section 24-77-103.6 (2) required because of the voter-approved revenue change language that is added in subsections (1)(c) and (4) of the section? Stated differently, if the voter-approved revenue change was added to sections 39-22-104 and 39-22-301, C.R.S., would it still be necessary to make these changes in section 24-77-103.6?
17. If there is no substantive change intended to section 24-77-103.6, which was a voter-approved revenue change without a related tax increase, the proponents might consider adding the voter-approved revenue language to article 22 of title 39, C.R.S. For example, similar language for the retail marijuana taxes was added as part of the tax provisions in sections 39-28.8-204 and 39-28.8-307, C.R.S.

18. The following questions relate to the proposed exception to the requirement that all income be taxed at a single rate under section 20 (8) of article X of the Colorado constitution (section 3 of the proposed initiative):
- a. By repealing the requirement that all income be taxed at a single rate, is it the proponents' intent to remove the constitutional restriction that might otherwise prevent the variable income tax rates included in the proposed amendments to section 39-22-104 (1.7)?
 - b. Does this allow the state to create any manner of graduated rates based on income or such other criteria as the state deems appropriate? Is there any requirement that corporations and individuals be treated in the same manner?
 - c. Is there any requirement that revenues collected as a result of graduating the rate be dedicated to the funding of public schools? Do the graduated rates need to be tied in any way to education?
19. The existing income taxes in 39-22-104 (1.7) and 39-22-301 (1)(d)(I)(I) "is imposed", while the income tax increment "shall be imposed". Is there a difference?
20. It is implied, but not stated, that the Colorado net income described in the new language of section 39-22-301 (1)(d)(I)(I) is that of a domestic C corporation and foreign C corporation doing business in Colorado. Is that your intention?
21. Could the general assembly reduce the income tax increment tax rates? Could it repeal these additional taxes altogether?
22. Section 39-22-627, C.R.S., creates a TABOR refund mechanism that is a temporary income tax rate reduction from 4.63% to 4.5%. If that refund mechanism applies in a given fiscal year, would it have any impact on the additional tax rates authorized under the proposed initiative?
23. Will the Department of Revenue be able to determine the tax revenue from the income tax increment?
24. How are income tax credits accounted for when determining the revenue from the income tax increment? For example, if a taxpayer had \$125,000 of Colorado taxable income, they would owe \$5,788 of tax for the 4.63% tax and \$93 for the income tax increment. If the taxpayer has an income tax credit of \$2,000. Does this credit affect the \$93 that would otherwise be deposited in the account?

25. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.

- a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
- b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
- c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Please include relevant headnotes for all constitutional and statutory sections.

For example:

Section 20. The Taxpayer's Bill of Rights. (8) Revenue limits. (a) New or increased transfer...

2. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon.
3. It is standard drafting practice to write out all dollar amounts, for example, "one hundred thousand dollars" rather than "\$100,000".

4. It is standard drafting practice to only capitalize proper nouns, such as "Colorado," and not the names of accounts, such as the Quality public education account.
5. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs. If a subsection is written as an introductory portion, it sets up the subsequent language and ends with a colon as such:

(1) [Subsection] is as follows:

(a) [Paragraph]; and

(b) [Paragraph].

Section 22-55-104.5 (3), C.R.S., of the proposed initiative is presented as an introductory portion but is not a set up for the subsequent paragraphs so much as it is included in the series. In this case, it would be more appropriate to construct the subsection as follows:

(3)(a) IN STATE FISCAL YEAR 2019-2020...

(b) UNTIL SUCH TIME AS A COMPREHENSIVE...

and so on...

In addition, when there is an introductory portion, it is necessary to include that language when amending any subsequent language relating to it. For example, amendments to section 39-22-301 (1)(d)(I)(I), C.R.S., should be written as follows:

39-22-301. Corporate tax imposed. (1) (d) (I) A tax is imposed upon each domestic C corporation and foreign C corporation doing business in Colorado annually in an amount of the net income of such C corporation during the year derived from sources within Colorado as set forth in the following schedule of rates:

(I) Except as otherwise provided in section 39-22-627, for income tax years ...

6. When referring to state and federal acts, the official names are initial capped, in quotes, and accompanied by the internal or external citation. For example, the "Every Student Succeeds Act", article 11 of title 22, and the "Every Student Succeeds Act", Pub.L. 114-95.

7. Standard drafting practice now refers to all internal citations at their subsection level. For example:
 - a. "in this subparagraph" is written as "in this subsection (1)(d)(I)(I)" (see section 39-22-301);
 - b. "with paragraph (b)" is written as "with subsection (3)(b) of this section". (see section 22-55-104.5 (3)(a)).
8. Please reletter the added paragraphs in section 39-22-104 (1.7), C.R.S., to correctly reflect the order (a), (b), (c), and (d).
9. For purposes of the statutory portion of the initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty." Please consider using the terms "shall" or "must" as directives, rather than the term "will".